ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Petition for Forbearance of	)	DA 98-111
the Cellular Telecommunications	)	
Industry Association	)	

COMMENTS OF BELL ATLANTIC MOBILE, INC.

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Bell Atlantic Mobile, Inc. ("BAM"), by its attorneys, hereby submits its Comments in support of the "Petition for Forbearance" filed December 16, 1997, by the Cellular Telecommunications Industry Association ("CTIA").

SUMMARY

CTIA asks that the Commission forbear from enforcing its rules imposing wireless number portability requirements upon CMRS providers,[1] until at least the five-year buildout period for PCS licensees to construct their systems expires. BAM agrees. Forbearance from wireless number portability rules is not only appropriate; it is required by law.

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[1] 47 C.F.R. §§ 52.21 et seq. The rules apply to cellular, broadband PCS and certain "covered" SMR providers. They were adopted in Telephone Number Portability, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 ("Order"), Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 7236 (1997) ("Reconsideration Order"). CTIA's request does not concern the obligation of CMRS providers to complete calls to ported landline numbers. Petition at 3 n. 7.

Section 10(a) of the Communications Act[2] compels the Commission to forbear from enforcement of a rule when the tests set forth in that provision are met.[3] It states that the Commission

> shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications services, in any or some of their geographic markets, if the Commission determines that --
>
> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.

CTIA demonstrates that forbearance is required under Section 10(a). Wireless number portability rules have no bearing on whether carriers will impose unjust or otherwise unlawful charges or practices, nor are the rules necessary to protect consumers. Other provisions of the Act fully protect consumers and police

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[2]Section 10(a) was added to the Communications Act by Section 401 of the Telecommunications Act of 1996, and is codified at 47 U.S.C. § 160(a).

[3]In this regard, Section 10 is distinct from the only previous forbearance provision in the Communications Act, Section 332(c)(1)(A), which makes forbearance discretionary with the Commission. Section 332(c)(1)(A), however, contains the identical three-part substantive standard for forbearance as Section 10. The Commission has applied Section 332(c)(1)(A) to forbear from enforcement of various provisions of the Act. Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411 (1994) ("CMRS Second Report and Order"). Those forbearance rulings confirm that forbearance from CMRS number portability rules is also warranted.

against unjust, unreasonable or discriminatory conduct, and the Commission has expressly relied on these provisions in previously granting forbearance from applying other requirements to CMRS providers. Moreover, the number portability rules were not based on any record evidence or finding that they were needed to ensure against unlawful charges or practices or to protect consumers.

The third test of Section 10(a) is also satisfied because forbearance from applying the wireless number portability rules would be consistent with the public interest. The Commission applies this test by evaluating benefits and costs of enforcing the rule. There is no evidence that imposing wireless number portability requirements on CMRS providers will achieve competitive benefits. As CTIA demonstrates, the wireless industry is competitive without number portability. There is also no evidence that this new obligation is needed to stimulate CMRS entry or to meet the needs of subscribers. Customers frequently change CMRS carriers, and new entrants are taking subscribers from existing providers. Most tellingly, the very carriers that number portability was intended to help now state that they do not want it.

Forcing wireless number portability will, however, be inconsistent with the public interest. Wireless carriers face uniquely difficult and expensive technical burdens and costs to comply with number portability. Meeting those burdens and costs can only hinder competition, discourage lower prices and undermine the Commission's goals for CMRS. Forbearance would also be consistent with the public interest because the Commission has held that minimal CMRS regulation,

imposed only when necessary, serves the public interest.

Accordingly, the Commission must forbear from enforcing the wireless number portability rules against all CMRS providers which are subject to those rules.[4] It has no discretion not to do so.[5]

I. ENFORCEMENT OF CMRS NUMBER PORTABILITY RULES IS NOT NECESSARY TO ENSURE JUST AND REASONABLE CHARGES OR PRACTICES, OR TO PROTECT CONSUMERS.

CTIA correctly observes that, given wireless market forces and vigorous wireless competition, enforcement of wireless number portability "is not necessary to ensure that the charges, practices, classification or regulations" of CMRS

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[4]CTIA requests that forbearance be granted as to all CMRS providers subject to the rules. BAM agrees. There would be no basis to limit forbearance to a particular class of carrier. The Commission has consistently emphasized the importance of "regulatory symmetry," to ensure that competing CMRS providers are subject to even-handed regulation, particularly those CMRS providers that are subject to number portability obligations: cellular, broadband PCS and "covered" SMR providers. Implementation of Sections 3(n) and 332 of the Communications Act, GN Docket No. 93-252, Third Report and Order, 9 FCC Rcd 7988, 8012; Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, First Report and Order, 11 FCC Rcd 18455 (1996) (applying same roaming rule to cellular, broadband PCS and SMR providers).

[5]BAM filed a petition for review of the rules which is pending in the Tenth Circuit. Bell Atlantic NYNEX Mobile, Inc. v. FCC, No. 97-9551. BAM contended that, in adopting the rules, the Commission failed to comply with Sections 251 and 332 of the Communications Act. BAM also argued that the Commission's action lacked the requisite record basis and was arbitrary and capricious. If the Tenth Circuit invalidates the rules, the issue of forbearance would be moot. However, in the event that the Tenth Circuit affirms the rules, the Commission would still be required to address CTIA's Petition and forbear under Section 10. Each of the three tests set forth in that provision for forbearance are met, for the reasons CTIA advances and for the additional reasons set forth in these Comments.

providers "are just and reasonable and are not unjustly or unreasonably discriminatory," and "is not necessary for the protection of consumers." 47 U.S.C. §10(a). Petition at 7-8. There are additional reasons why number portability rules are not needed to prevent CMRS providers from imposing unjust or unreasonable charges or practices, or to protect consumers. In fact, number portability burdens are simply irrelevant to the concerns set forth in the first two prongs of Section 10(a). Accordingly, these forbearance tests are met.

A. Numerous Provisions of the Act Adequately Guard Against Unjust or Unreasonable Carrier Practices.

These sections are expressly designed to discourage such unlawful charges and practices, and to empower the Commission and federal courts with a broad array of remedies and sanctions if they do occur. Section 201 prohibits common carriers (including CMRS providers) from imposing any "charge, practice, classification, or regulation that is unjust or unreasonable." Section 202 declares, "It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination" in its charges, practices, classifications or regulations." Section 208 empowers the Commission to protect consumers by awarding damages and taking other actions against carriers which are found to engage in unjust, unreasonable, or unlawfully discriminatory conduct.

In prior decisions granting forbearance as to other CMRS obligations, the Commission relied on Sections 201, 202 and 208 as the basis for finding that the first two forbearance tests had been met. For example, in 1994, it forbore from

enforcing Section 203's tariff requirements on CMRS providers.[6] At that time, the Act's sole forbearance provision was Section 332(c)(1)(A). While it applied only to CMRS providers, it contained the identical tests for forbearance that the 1996 Act incorporated into new Section 10. Addressing the first two prongs of the Section 332(c)(1)(A) forbearance standard, the Commission found that enforcement of Section 203 was not necessary to ensure that rates and practices were not unjust or unlawfully discriminatory, or to protect consumers, specifically because Sections 201, 202 and 208 were available:

> [T]he continued applicability of Sections 201, 202 and 208 will provide an important protection in the event there is a market failure. . . . Compliance with Sections 201, 202 and 208 is sufficient to protect consumers. In the event that a carrier violated Sections 201 or 202, the Section 208 complaint process would permit challenges to a carrier's rates or practices and full compensation for any harm due to violations of the Act.[7]

The same analysis applies here. Given the continued availability of Sections 201, 202 and 208 to review the practices of CMRS providers, address complaints, and protect consumers, wireless number portability provides no added protection.[8]

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[6]CMRS Second Report and Order, 9 FCC Rcd 1411, 1478-81 (1994).

[7]Id., 9 FCC Rcd at 1478-79.

[8]In the CMRS Second Report and Order, the Commission did not forbear from certain provisions of the Act that were expressly intended to safeguard the public. For example, it found Sections 206, 207 and 209 should be enforced because they supplied remedies for consumers who are harmed by carrier practices. And it found that Sections 223 (obscene or harassing telephone calls), 227 (telemarketing) and 228 (pay-per-call services) were directly intended to protect the public. 9 FCC Rcd at 1481-90. The Commission, by contrast, did not base its decision to impose wireless number portability on any such consumer protection concern.

B. The Number Portability Rules Were Not Based on Any Findings That They Would Prevent Unlawful Carrier Practices, or Would Protect Consumers.

At no point in its decisions imposing number portability obligations did the Commission find that CMRS carriers were engaging in unjust, unreasonable or discriminatory practices, or that wireless number portability was needed to discourage them. Nor did the Commission base its action on a finding as to a need to protect consumers, or on any concern that consumers were somehow vulnerable to unlawful practices without number portability. Its action was instead premised entirely on the belief that portability would assist new CMRS entrants in attracting subscribers, and would thereby increase competition among wireless providers. There is nothing in the rulemaking orders, and nothing in the underlying administrative record, that could support a finding that the rules are needed to guard against unlawful carrier practices or to protect consumers.

Even when wireless service was principally a cellular duopoly, the Commission never identified the lack of ability to change carriers while keeping the same phone number as a public interest concern. Yet it was familiar with number portability, and had adopted number portability rules to govern the offering of certain services.[9] Had there been any CMRS-related consumer protection issue, it would have surfaced at the time when wireless services were much less competitive than they are today. Given the lack of any consumer protection basis for

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[9]Provision of Access for 800 Services, CC Docket No. 86-10, 6 FCC Rcd 5421 (1991); 7 FCC Rcd 8616 (1992) (imposing portability obligations on 800 service).

wireless portability then, there can be no justification for such rules now.

II. FORBEARANCE FROM REQUIRING CMRS CARRIERS TO PROVIDE NUMBER PORTABILITY IS CONSISTENT WITH THE PUBLIC INTEREST.

The third test of Section 10(a) is also satisfied, because forbearance from enforcing wireless number portability rules would be consistent with the public interest. The Commission has held that the public interest test for forbearance, like the other references to "public interest" in the Communications Act, is to be broadly and flexibly construed, not limited to particular factors.[10] It has thus, for example, held that any burdens and costs to carriers, as well as the impact on competition, are all appropriately considered.[11]

Applying this standard to wireless number portability clearly shows that

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[10]Bell Operating Companies Petition for Forbearance from the Application of Section 272 of the Communications Act of 1934, as Amended, to Certain Activities, CC Docket No. 96-1489, DA 98-220 (Common Carrier Bureau, released February 6, 1998) ("BOC Forbearance Order"). The Commission noted that Section 10(b) of the Act provides that if it determines that "forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest." But it rejected the argument that it could not forbear absent a showing that forbearance would enhance competition: "The plain meaning of the statutory language is that a determination that forbearance would promote competition is a possible, though not a necessary, basis for a finding that forbearance would be consistent with the public interest." It went on to find that no such competitive benefit would result, yet granted forbearance. Id. at ¶¶ 47-49.

[11]BOC Forbearance Order at ¶¶ 46, 95; Federal Communications Bar Association's Petition for Forbearance from Section 310(d) of the Communications Act Regarding Non-Substantial Assignments of Wireless Licenses and Transfers of Control Involving Telecommunications Carriers, FCC 98-18 (released February 4, 1998) ("FCBA Forbearance Order").

forbearance would be consistent with the public interest. There is no evidence that applying wireless number portability requirements to CMRS providers will in fact achieve any tangible competitive benefits. As CTIA demonstrates, the wireless industry is becoming increasingly competitive without number portability,[12] and there is no evidence that forbearance would have any effect on those pro-competitive trends. However, enforcing these rules on CMRS carriers, which face uniquely difficult and expensive compliance problems, is more likely to hinder competition, provoke higher prices and undermine some of the Commission's own goals for wireless services.

A. There is No Evidence That Number Portability Will Enhance CMRS Entry or Competition.

The Commission devoted most of its orders adopting number portability rules to findings as to the benefits for landline competition, but then transposed those findings to CMRS without a CMRS-related basis to do so. It thus asserted that the lack of portability "hinders the successful entrance of new service providers into the cellular, broadband PCS and SMR markets." Order at ¶ 157. But there was no evidence to support the Commission's casual extrapolation of its landline conclusions to CMRS. Developments in the nearly two years since the

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[12]Petition at 5 ("competition is already flourishing in the CMRS industry notwithstanding the current lack of implementation of CMRS number portability"). The Petition contains numerous examples of the growth of vigorous CMRS competition, all of which are occurring without wireless number portability -- indeed the technology to provide wireless portability is not yet even available. See CTIA Petition for Extension of Implementation Deadlines, CC Docket No. 95-116, filed November 24, 1997.

Commission adopted CMRS number portability show even more strongly that there was no basis for the Commission's conclusion that there is a nexus between wireless portability and CMRS entry. PCS carriers and other new entrants are entering new geographic markets and building market share -- all without number portability. While entry of new competitors is consistent with the public interest, there is no basis to conclude that number portability will cause or promote such entry. There is no nexus between the two.

The Commission's March 1997 analysis of the wireless industry found that competition is present and new entry is steadily increasing, all without portability. In its Competition Report to Congress on CMRS,[13] the Commission touted the rapid entry of new carriers into wireless markets, noting that it had "issued over 1,500 new CMRS licenses" and expected to continue issuing still more licenses "at a rapid rate." It found that new PCS systems had been placed in operation in most markets, that new entrants were driving down prices for existing cellular service, and that "most broadband PCS licensees appear to be expeditiously constructing and placing their systems in operation." "Competition," the FCC proclaimed, "is developing throughout the industry."[14] Given these findings, there is no rational basis to conclude that number portability would have a tangible

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[13]Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, Second Report, 7 Comm. Reg. (P & F) 1 (1997) ("Competition Report").

[14]Id., 7 Comm. Reg. (P & F) at 1-5.

impact on competition, and there is no market failure that portability could even potentially alleviate.

The Competition Report shows in other ways that number portability is not needed to stimulate new entry. It touts the entry of Sprint/APC, one of the first PCS entrants, into the Washington-Baltimore market, noting that Sprint/APC had acquired 100,000 subscribers in its first six months of operation, and was "taking 35 percent of new wireless voice subscribers"[15] -- all without wireless portability. There is no evidence that Sprint/APC was hindered by the lack of number portability. The FCC's claim that number portability rules are needed to remove barriers to CMRS entry is undermined by what the agency itself has found is happening in the market without such rules. Its findings in the Competition Report were consistent with numerous comments in the number portability rulemaking that argued portability was not needed to promote new CMRS entry.[16]

More recent evidence confirms that there is no need for wireless number portability to spur competition. The rapid growth of PCS continues to accelerate without it. The many analyses reporting on this growth forecast continued fast expansion of new entrants' market share. For example:

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[15]Id., 7 Comm. Reg. (P & F) at 5.

[16]CTIA Comments (Sept. 12, 1995), at 9 (wireless industry is already competitive without number portability); AirTouch Reply Comments (Oct. 12, 1995), at 5-6 (low barriers to entry in CMRS market is evidenced by "fact that new wireless competitors such as PCS providers have recently spent billions of dollars on new wireless licensees without the expectation that there would be wireless number portability"); MobileMedia Communications, Inc. Reply Comments (Apr. 5, 1996), at 2.

-- A January 1998 study of eighteen wireless markets with PCS systems in operation found that PCS was capturing one-third of all new wireless customers, and concluded that these new entrants "are likely to capture a more substantial portion of the wireless market."[17]

-- Merrill Lynch concluded in November 1997 that "PCS buildout has continued at a rapid clip," and that there was already at least one operational PCS network in 83 of the top 100 wireless markets. It also found that new entrants were capturing one third of net adds, and that, during the third quarter of 1997, Nextel, an SMR provider, added more subscribers than any cellular company.[18]

-- Lehman Brothers announced that same month that it was "bullish" on the four "pure play PCS companies" (Omnipoint, Aerial, Powertel and Western Wireless) because of its "detailed industry model, which forecasts that PCS will be able to gain significant market share from the cellular carriers."[19] Lehman Brothers noted that PCS was taking increasing shares of both first-time wireless customers and customers that decided to change carriers.

-- A Donaldson Lufkin & Jenrette study also reported that PCS is winning an increasing proportion of new wireless customers.[20]

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[17]Communications Daily, January 14, 1998, at 6 (reporting new CMRS market study by J.D. Power & Associates).

[18]Merrill Lynch, United States Telecommunications/Cellular, "The Matrix -- 3Q 1997," December 15, 1997.

[19]Lehman Brothers, "The PCS Report," November 11, 1997.

[20]Donaldson Lufkin & Jenrette, "The Wireless Communications Industry," Spring 1997.

-- A survey of 1,000 wireless customers revealed that price, coverage and reliability of service were the key competitive factors in decisions as to which carrier to use. The need to obtain a new phone number in changing carriers was not mentioned as a factor.[21]

B. There is No Evidence That the Absence of Wireless Number Portability is Discouraging Subscribers From Changing Carriers.

When the Commission adopted number portability rules, it noted studies indicating that telephone subscribers might be more likely to switch to new telecommunications providers if they could maintain their same telephone numbers. The Commission thus found that CMRS number portability would promote competition. Order at ¶ 29. These studies, however, concerned landline service only. The Commission cited no similar studies to show customers are reluctant to switch CMRS providers because of lack of number portability. There were in fact no such surveys in the record, nor is BAM aware of any subsequent studies establishing that the lack of wireless number portability discourages CMRS subscribers from changing carriers.

Moreover, the record did contain statements that customers do not place the same value on their wireless numbers, which are not typically included in phone directories or in operator information databases, and that customers generally do not advertise their wireless numbers because they generally pay for incoming as

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[21]Peter D. Hart Research Associates, "Competition in the Wireless Market," February 1997.

well as outgoing calls.[22] One study which was filed with the FCC reported that "a large portion (probably over 90 percent) of the cellular users today do not even know their cellular phone number."[23] The record in this proceeding supplies no basis to conclude that a wireless customer would find changing the handset's number to be a reason not to switch wireless carriers.

The only factual information on subscriber switching shows precisely the contrary: that lack of number portability is not impairing customers' choice of CMRS carriers. There is extensive turnover of CMRS customers from one competing carrier to another. Evidence submitted in the record of this docket shows that from 13 to 30 percent of CMRS customers switch carriers each year -- and do so without number portability.[24] The record reveals that CMRS subscribers are able to, and do, switch to providers offering what they perceive to be better services or rates. Recent studies show that this subscriber churn is continuing as existing CMRS providers lose customers to new entrants.

The Commission's premise for requiring wireless number portability is that subscribers would be more likely to switch from incumbent cellular carriers to new

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[22]E.g., Airtouch Reply Comments (Oct. 12, 1995), at 4 ("wireless customers are generally not attached to 'their' wireless numbers. . . [and] are very willing to change telephone numbers when they can get better or cheaper service from another carrier");CTIA Comments (Sept. 12, 1995), at 9-10.

[23]BellSouth Comments (Sept. 13, 1995), at 13 (quoting Morgan Stanley, U S Investment Research: Telecommunications Services (Mar. 2, 1995), at 3).

[24]BellSouth Comments (Sept. 13, 1995), at 13; CTIA Reply Comments (Oct. 12, 1995), at 4-5; GTE Opposition to Petitions for Reconsideration (Sept. 27, 1996), at 21-22.

PCS or SMR entrants if they could keep the same number. But in fact, cellular subscribers who want to switch to a PCS or SMR provider face a more immediate barrier -- they have to obtain a new phone. This is because most wireless phones are not capable of serving all of the different spectrum bands used by cellular, PCS and SMR systems. It is the need to buy a new phone, not the inability to keep the same number, which may impair carrier changes, and the presence of number portability is irrelevant to that barrier. Yet PCS carriers continue to attract current cellular customers without mandated number portability. There is simply no cause and effect relationship between wireless number portability and subscribers' ability to change their CMRS provider.

C. The Same CMRS Carriers the Rules Were Intended to Benefit Request Forbearance From Those Rules.

The wireless number portability rules were based on the Commission's belief that they would assist new CMRS entrants, primarily PCS carriers. That belief has proven unfounded, because those same PCS carriers are now seeking forbearance. CTIA, which represents 48 of the 50 largest PCS and cellular carriers, states that its PCS members "have concluded that CMRS number portability imposes more of a financial burden than a competitive benefit for their entry into the CMRS market." Petition at 4. CTIA's PCS members are opposed to devoting scarce resources to deploying number portability, because those resources must be diverted from other investments that will (unlike portability) help them compete.

Unlike the Commission's predictive claims (based on no market data) that wireless number portability was needed, the PCS carriers' position is based on their "actual experience in the CMRS marketplace." Id. The Commission's prediction as to the benefits from imposing wireless number portability has proven to be wrong. Real-world experience shows that the very carriers the agency intended to help do not want that "help." Refusing to forbear in the face of this position by the very parties the rule was intended to assist would be irrational as well as unlawful.

D. Forbearance is Consistent With the Public Interest Because it Will Conserve CMRS Costs and Allow New Carriers to Focus on Expanding Service to the Public.

The record contains ample evidence that wireless number portability will impose costs and burdens on CMRS carriers who must reconfigure their networks and purchase new equipment and software. CTIA explains why forcing CMRS carriers to devote extensive resources to deploying portability will divert resources from expanded coverage and other pro-competitive investments in their networks. CTIA stresses that its forbearance request is based on the "actual experience" of its PCS and other wireless members, which has led those carriers to conclude:

> [T]he capital requirements of implementing CMRS number portability will impede such buildout and reduce price competition without a commensurate impact on competition. The result may be to diminish rather than increase competition. . . . Regulatory burdens that have not been proven to be warranted in the marketplace will serve mainly to dampen continued competition as carriers must divert their finite resources toward meeting the Commission's directives.

Petition at 4-5, 6. Thus the only record evidence undercuts the rationale for requiring wireless number portability, and in fact shows that the rules will divert investments in expanded wireless services to the public, will retard the trend toward lower prices, or both. Either result is contrary to the public interest.

The Commission recently determined on two occasions that cost savings to carriers from forbearance supports a Section 10(a) finding that forbearance is consistent with the public interest. It first granted forbearance from Section 310(d) of the Act, which requires prior approval of pro forma transfers of control, to wireless licensees.[25] It found that the public interest test was met in part because "forbearance will also eliminate a significant and unnecessary expenditure of carrier and Commission resources."[26]

The Commission also relied on costs to carriers in granting a petition for forbearance from Section 272 of the 1996 Act, which establishes separate affiliate requirements for the provision of certain services by Bell Operating Companies. The BOCs petitioned for forbearance from applying these requirements to Enhanced 911 ("E911") services and to BellSouth's "reverse directory" services. The Commission granted forbearance, finding that each of the Section 10 criteria

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[25] FCBA Forbearance Order, supra n. 11.

[26] Id. at ¶ 20. The Order noted that one large carrier would incur $60,000 in filing fees in a pro forma reorganization. Id. These expenditures (incurred in voluntary transfers) are dwarfed by the millions of dollars which carriers must spend on deploying wireless number portability. If the costs of filling out paperwork and filing fees for pro forma applications support a public interest forbearance finding, then the massive burdens of wireless number portability unquestionably do so as well.

were met.[27] In addressing the third test, it concluded that forbearance to permit integrated E911 services was "consistent with the public interest" because integration "produces substantial cost savings." Id. at ¶ 46. It also found that forbearance to permit BellSouth to offer integrated directory services was consistent with the public interest: "[I]f BellSouth were to offer reverse directory services through a separate affiliate, BellSouth's costs of providing those services would increase significantly. These costs would presumably be passed through to consumers in the form of increased charges." Id. at ¶ 95.

The Commission's decision in Bell Operating Companies is directly applicable here, and supports the finding that forbearance would be consistent with the public interest because of the enormous costs that CMRS providers will otherwise be required to bear. As CTIA points out in its Petition (at 3-6), forbearance is consistent with the public interest because wireless number portability "imposes more of a financial burden than a competitive benefit." The financial resources needed to implement wireless number portability will only detract from the ability of CMRS providers to enhance coverage areas and reduce rates.

E. Forbearance is also in the Public Interest Because Enforcement of the Rules will Impair Roaming and Anti-Fraud Efforts.

In 1996 the FCC found that roaming was important for competition and for customers, because it enables carriers to offer "seamless" wireless services:

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[27] BOC Forbearance Order, supra n. 10.

> [T]he widespread availability of roaming capability on cellular, broadband PCS and covered SMR networks promotes the public interest in nationwide, ubiquitous, and competitive telecommunications service.[28]

Information in the record of the number portability proceeding, however, warned that current roaming technologies were incompatible with number portability, and that there was no present solution to this problem.[29] Thus, the record indicates that roaming, and its benefits for customers wanting to make or receive wireless calls while traveling, would be impaired by portability.

Moreover, competition could also be hindered as carriers with smaller service areas (and the concomitant need to rely on roaming) are forced to incur the costs of implementing portability. As CTIA notes, for number portability to work, it must be implemented by carriers in all markets, and thus by small carriers with limited resources or serving sparsely populated areas. Petition at 8 n. 15. The adverse impact on smaller CMRS carriers' ability to expand service, because of the need to finance number portability, is another public interest basis for granting forbearance.

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[28]Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, Second Report and Order and Third Notice of Proposed Rulemaking, 11 FCC Rcd 9462, 9464 (1996).

[29]CTIA Comments (Sept. 12, 1995), at 6 ("None of the wireline-based number portability proposals will permit cellular roaming"); SBC Comments (Sept. 12, 1995) at App. F-2 to F-5 (portability will "destroy the roaming process efficiencies"); PCIA Comments (Sept. 12, 1995), at 9; BellSouth Comments (Sept. 13, 1995), at 40.

The FCC has also taken numerous actions to reduce wireless fraud, the unauthorized use of CMRS handsets or numbers, recognizing that this is a critical public interest concern, imposing major costs on industry and the public.[30] Record information in the portability rulemaking, however, revealed that portability would make fraud detection and prevention more difficult and expensive.[31] Again, the FCC did not address this concern or how the competing consideration of fraud deterrence would be reconciled with CMRS number portability obligations. Again, forbearance would avoid impairing the very anti-fraud efforts the Commission has supported. For this reason as well, forbearance would be consistent with the public interest.[32]

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[30]In a 1994 rulemaking, for example, the FCC found that "The record before us demonstrates the need for measures that will help reduce the fraudulent use of cellular equipment." It thus adopted new 47 C.F.R. § 22.919, stating that, "The purpose of this new provision is to deter cellular fraud." Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Report and Order, 9 FCC Rcd 6513, 6525 (1994).

[31]Airtouch Reply Comments (Oct. 12, 1995), at 10-11 (premature imposition of number portability on wireless industry could "gravely hurt" Commission's efforts to fight wireless fraud); CTIA Comments (Sept. 12, 1995), at 7 (wireless number portability could compromise "anti-fraud mechanisms"); GTE Petition for Reconsideration (Aug. 26, 1996), at 21-22 (wireless portability obligations will force redesign of anti-fraud systems).

[32]Section 11 of the 1996 Act, codified at 47 U.S.C. § 161, states that, this year, the Commission "shall review all regulations issued under this Act," "shall determine whether any such regulation is no longer necessary in the public interest as the result of meaningful economic competition between providers of such service," and "shall repeal or modify any regulation it determines to be no longer necessary in the public interest." (Emphasis added.) The wireless number portability rules are precisely the type of regulation that Congress intended to be subject to Section 11 review. Given the absence of any established nexus between wireless number portability and CMRS competition, and the presence of ample data that shows vibrant CMRS competition, the wireless number portability rules

III. FORBEARANCE WILL FULFILL THE ACT'S DISTINCT, LIMITED APPROACH TO CMRS REGULATION .

Forbearance from applying number portability requirements to CMRS providers is also consistent with the public interest because both Congress and the Commission have concluded that a limited regulatory approach to CMRS serves the public interest. Forbearance would further that key policy.

In the past five years, Congress enacted two major amendments to the Communications Act, and both times followed a distinct approach to wireless services which was to rely primarily on market forces rather than regulation to promote expansion of a competitive wireless industry. In 1993, Congress rewrote section 332 of the Act to codify a new federal policy for regulating mobile radio services.[33] The new paradigm was intended to place primary reliance on market forces, rather than government intrusion, to promote a customer-responsive mobile services industry. To implement this new approach, Congress authorized the FCC to forbear from enforcing most provisions of Title II of the Act, and to preempt the states from rate and entry regulation of these mobile services. 47 U.S.C. § 332(c).

The Commission's decisions implementing section 332 followed Congress's mandate to rely on competition rather than regulation. In its first such decision, the FCC proclaimed:

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must be repealed under Section 11 as well.

[33]These changes are contained in Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 ("OBRA"), Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 392-96.

> We establish, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees that are classified as CMRS providers.[34]

Its next decision, which made its existing rules for different types of CMRS providers more consistent, stated that this action

> is an essential step toward achieving the overarching congressional goal of promoting opportunities for economic forces -- not regulation -- to shape the development of the CMRS market.[35]

Finally, the Commission invoked its new CMRS preemption authority by striking down eight states' regulatory schemes for cellular carriers.[36] It stated even more forcefully Congress's policy of different, limited CMRS regulation, and its full agreement with that policy:

> In 1993, Congress amended the Communications Act to revise fundamentally the statutory system of licensing and regulating wireless (i.e., radio) telecommunications services. . . .
>
> Section 332(c), for example, empowers the Commission to reduce CMRS regulation, and it places on us the burden of demonstrating that continued regulation will promote competitive market conditions. . . .
>
> Congress delineated its preference for allowing this emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure.[37]

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[34]CMRS Second Report and Order, 9 FCC Rcd at 1418.

[35]CMRS Third Report and Order, 9 FCC Rcd at 8004.

[36]Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers, 10 FCC Rcd 7025, 7031 (1995), aff'd, 78 F.3d 842 (2d Cir. 1996).

[37]Id. at 7025, 7030-31.

In other proceedings, the FCC followed these deregulatory principles. For example, it determined to impose a rule on CMRS providers which required them to permit other parties to buy and resell CMRS services, only after a detailed analysis of the costs and benefits of that action. It held that this rule, "like all regulation, necessarily implicates costs, including administrative costs, which should not be imposed unless clearly warranted."[38]

The 1996 Act continues the distinct, limited approach to federal oversight of CMRS in contrast to more extensive regulation of local landline phone markets. Congress included provisions in the 1996 Act to ensure that CMRS providers would not be subjected to the new rules intended to open landline telephone markets to competition by, for example, exempting CMRS providers from the definition of a local exchange carrier, and subjecting CMRS providers only to the more limited duties of telecommunications carriers generally.[39] Indeed, the one reference to number portability in the 1996 Act, Section 251(b), directed local exchange carriers to provide landline number portability -- but did not apply to CMRS providers at all.

In short, Congress and the Commission have adopted a special approach to CMRS regulation that finds that the public interest is best served by reliance on market forces, not regulation, unless there is a clear market failure or need that

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[38]Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, First Report and Order, 11 FCC Rcd 18455, 18463 (1996) (emphasis added).

[39] Section 3(26), 47 U.S.C. § 153(26)